"If the defendant had taken a license to sell intoxicating liquors at a certain place, it would so far show that he had made preparations to carry on the business there, and would be a circumstance somewhat similar in its nature to the putting up of his sign over the door, or procuring the ordinary implements of the traffic." Commonwealth *v.* Keenan, 11 Allen (Mass.) 262.

But in Maine the defendant cannot be found guilty of being a common seller of intoxicating liquors simply because he has paid the tax as a retail liquor dealer; but the jury must be satisfied of his guilt beyond a reasonable doubt. Following State *v.* Liquors, 80 Me. 57, 12 Atl. 794; Leavitt *v.* Baker, 82 Maine 26, 19 Atl. Rep. 86.

In Texas it was held, where, in a prosecution for violating the local option law, it was shown that the defendant sold whiskey, it was not error to instruct that the finding of a United States internal revenue license in the place where the sale was made was prima facie proof that the holder thereof was engaged in the sale of intoxicating liquor. Magee *v.* State (Tex.), 98 S. W. 245. See, also, Floeck *v.* State, 34 Tex. Cr. R. 314, 30 S. W. 794; Gerstenkron *v.* State, 38 Tex. Cr. R. 621, 44 S. W. 503; Thompson *v.* State (Tex.), 97 S. W. 316.

But in Barnes *v.* State (Tex.), 44 S. W. 491, it was held, not to constitute error to charge that the mere possession by defendant of such internal revenue license would not authorize a conviction, but is to be considered with all the other evidence, and as a part of the same, in determining whether defendant was guilty of the offense charged.

In Peyton *v.* State (Ark.), 102 S. W. 1110, it was held, that a certificate of the collector of internal revenue of the district that defendant's name appeared on his list as having paid the special tax as a retail liquor dealer was the officer's mere ex parte statement, and was neither admissible nor prima facie proof that defendant was keeping a "blind tiger."

In a prosecution for violating Rev. St., art. 5060a, as amended by the 25th legislature, requiring a license for selling intoxicating liquors on physician's prescriptions in a local option district, possession of an internal revenue license, while prima facie proof of the sale of the liquor in question, is not proof that defendant was engaged in selling liquor on prescriptions in a local option district. Williamson *v.* State, 41 Tex. Cr. Rep. 461, 55 S. W. 568.

In a prosecution for violating the local option law, the possession of an internal revenue license, as required by the laws of the United States, for the sale of malt liquors, by defendant, is not conclusive evidence that he was a dealer in intoxicating liquors. Denton *v.* State (Tex.), 105 S. W. 199; Thompson *v.* State (Tex.), 97 S. W. 316; Uloth *v.* State, 13 Tex. Ct. Rep. 521, 87 S. W. 822.

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## WOODSON *v.* COMMONWEALTH.

Jan. 16, 1908.

[59 S. E. 1097.]

**1. Rape—Assault with Intent to Rape—Elements.**—A charge of assault with intent to rape can only be established by proof of force or attempted force, coupled with an attempt to have sexual intercourse with prosecutrix against her will and notwithstanding her resistance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 15-19.]

**2. Same—Evidence.**—On a trial for assault with intent to rape, prosecutrix testified that before dark, when returning home, she met accused, who stood in the path with a shotgun and, disguised by having his face blackened, seized her and said, "Hold on, I want some;" that she ran to a neighbor, and told him; and that the neighbor went to look for accused and could not find him. Held to justify a conviction for aggravated assault, but not for assault with intent to rape.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 78-82.]

**3. Criminal Law—Proof of Guilt—Evidence.**—The guilt of accused cannot be inferred because the facts are consistent with his guilt, but they must be inconsistent with innocence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1261.]

Whittle, J., dissenting.

Error to Circuit Court, Buckingham County.

John W. Woodson was convicted of assault with intent to rape, and he brings error. Reversed, and new trial awarded.

*Moon & Moss,* for plaintiff in error.
*The Attorney General* and *Sands Gayle,* for the State.

HARALSON, J. The indictment in this case charges the accused with an attempt to commit rape upon a certain female. In such cases force is an essential element of the crime. To sustain the charge of an attempt to commit rape, there must be evidence of force, or of an intention on the part of the offender to use force, in the perpetration of the heinous offense, if it should become necessary to overcome the will of his victim. The crime of assault with intent to rape can only be established by proof of force or attempted force, coupled with an attempt to gratify the lustful desire, against the consent of the female, notwithstanding resistance on her part. Hairston *v.* Com., 97 Va. 754, 32 S. E. 797; Cunningham *v.* Com., 88 Va. 37, 13 S. E. 309; Christian *v.* Commonwealth, 23 Grat. 954; Jones *v.* State, 90 Ala. 628, 8 South. 383, 24 Am. St. Rep. 850; Dorsey *v.* State, 108 Ga. 477, 34 S. E. 135; State *v.* Massey, 86 N. C. 658, 41 Am. Rep. 478; Green *v.* State, 67 Miss. 356, 7 South. 326.

In the case at bar the testimony of the prosecutrix is the only evidence showing the facts and circumstances attending the occurrence. She says that before dark on the 9th of January, 1907, she went to the spring, about one-fourth of a mile from her home, to get a bucket of water; that when returning the accused was standing in the path, with a double-barrel shotgun

and his face blackened, though she could see the natural color of his neck and hands; that he followed her along the path, and when she had gotten about half way home he came up to her and seized her arm and said, "Hold on, I want some;" that she screamed, and ran to a neighbor's house, who lived about 200 yards from her home, and told him of the occurrence; and that this neighbor went down there with his gun but could find no one.

This evidence shows that the conduc of the accused was shockingly indecent and insulting, and, if believed by the jury, subjected him to a conviction for an aggravated assault; but the court is of opinion that it falls short of showing a felonious intent. However reprehensible his conduct, we are constrained to say that the testimony fails to show any attempt on the part of the defendant to employ any force whatever in the accomplishment of his purpose, whatever that may have been. There was no attempt to use force; no threat; only solicitation. The absence of all violence, and of evidence of any intention to use force, if necessary, to overcome the will of the prosecutrix, the time, and the place, invest the charge with improbability. The evidence is consistent with a desire on the part of the offender to have sexual intercourse with the prosecutrix; but there is no evidence of an intention to use force, if necessary, to gratify his desire—only persuasion.

"The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." Hairston's Case, *supra*.

This conclusion makes it unnecessary to consider other assignments of error.

We are of opinion that the circuit court erred in refusing to grant the plaintiff in error a new trial, for which error its judgment must be reversed, the verdict of the jury set aside, and a new trial awarded.

Reversed.

WHITTLE, J. (dissenting). I cannot concur in the opinion of the court in this case that the evidence for the commonwealth is insufficient to establish the corpus delicti, the attempted rape charged in the indictment.

The testimony of Mrs. Dunkum (a young married woman) bearing upon the essential fact of the attempted commission of the crime, which in many of its features is corroborated by other testimony, is certified as follows: "On January 9, 1907, she went to the spring about one-fourth of a mile from her home to get a bucket of water. She dipped out the water and started home. The accused * * * was standing in the path and asked her 'Who lives up there?' She replied, 'Elijah Dunkum.'

The accused had a double-barrel shotgun and his face blackened; but she could see the natural color of his face and hands. She started on home with the water, and the accused followed her along the path. When she had gotten about half way home, he said something which she did not hear sufficiently to know what it was. The accused then came up to her, and seized her left arm, and said, 'Hold on,'" accompanying that action and language with the declaration of his lustful desire. Whereupon she screamed and ran to the house of a neighbor, who lived about 200 yards distant from her home, and in an agitated and excited manner told him what had occurred. The neighbor, armed with a gun, repaired to the scene of the crime; but the accused had disappeared.

These facts, together with the reasonable inferences which the jury were justified in drawing from them, in my opinion, maintain the following propositions: That the accused (a young negro man), armed with a double-barrel shotgun, disguised himself to prevent identification, and beset the path, along which Mrs. Dunkum was returning from the spring to her home, for the purpose of intercepting her and of having carnal knowledge of her person against her will; that he pursued her along the pathway with that design; that he made known his lecherous desire, commanded her to stop in order that he might accomplish his purpose, and attempted to force the demand by laying hold of her person; and that he was deterred by her screams alone from the consummation of the offense.

It must be observed that the language of the accused did not import an indecent proposal, but conveyed a distinct demand, accompanied by a coercive act conducing to its fulfillment, and that the resistance and outcries of his intended victim frightened him off and prevented its consummation. If the foregoing are warrantable deductions from the facts proved, it can hardly be said that they fall short of proving the *corpus delicti*.

In this class of cases, the authorities are agreed that each case must be governed by the attendant circumstances, "among which (as was said in Christian's Case, 23 Grat. 954) the character and condition of the parties may have an important bearing. Acts of the accused, which would be ample to show and produce conviction on the mind that it was the wicked attempt and purpose to commit this infamous crime, if done in reference to a female of good and virtuous character, would be wholly insufficient to establish guilt if they were acts done to a female of dissolute character or easy virtue." The facts of that case were that the accused and the prosecutrix, both of whom were negroes, had attended an exhibition together in the night; that she was a base woman, the mother of two bastard children; that there was no attempt on his part to ravish her, the court characterizing his con-

duct toward the woman as "rough wooing" merely, and emphasizing the circumstance that there was no outcry on her part.

So, also, in the latest pronouncement of this court on the subject (Hairston's Case, 97 Va. 754, 32 S. E. 797), though the conviction was not sustained, the reasoning of Judge Riely conclusively shows that all the elements of the offense are present in the case in judgment. The learned judge remarks: "To sustain the charge of an attempt to commit rape there must be evidence of force, or of an intention on the part of the offender to use force, in the perpetration of the heinous offense, if it should become necessary to overcome the will of his victim." At page 757 of 97 Va., page 797 of 32 S. E., in summing up the circumstances of that case, it is said: "There was no attempt to use force; no threat; only solicitation. The absence of all violence, and of evidence of any intention to use force, if necessary to overcome the will of the prosecutrix, the time and the place, and all the surrounding circumstances, invest the charge with very great improbability."

The converse of the preceding enumeration of circumstances plainly appears from this record.

In conclusion, I desire to remark that, in estimating the significance of those circumstances, we must not close our eyes to the existence of a "Black Peril," which rests like a pall over the land, and constitutes an ever present menace to the safety of the white women of the South. Confronted by this horrible condition, which is known to all men and deplored by the right-thinking element of both races, we cannot, I submit, upon the cogent evidence before us, afford to set aside the verdict of the jury and establish a precedent, the dual tendency of which, in my judgment, will be to increase crime and to encourage resort to mob violence.

**Note.**

No doubt this case is correct according to strict rules of law, but its moral influence on the lawless and prejudiced is very far-reaching, and we fear it will furnish a mighty good excuse to would-be lynchers to mete out summary punishment to future offenders against this law. Judge Whittle, in his dissenting opinion, expressed himself very forcibly as follows, in which we heartily concur. He says: "We must not close our eyes to the existence of a 'Black Peril,' which rests like a pall over the land, and constitutes an ever-present menace to the safety of the white women of the South. Confronted by this horrible condition, which is known to all men and deplored by the right-thinking element of both races, we cannot, I submit, upon the cogent evidence before us, afford to set aside the verdict of the jury and establish a precedent, the dual tendency of which, in my judgment, will be to increase crime and to encourage resort to mob violence."